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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

IOWA UTILITIES BOARD, ET AL.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

PEOPLE OF THE STATE OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has statutory authority to issue rules implementing the core provisions of the Telecommunications Act of 1996 that open local telephone markets to competition, see 47 U.S.C. 251 *et seq.*, including, *inter alia*, the provisions governing dialing parity and the standards for the prices that an incumbent local exchange carrier (LEC) may charge potential competitors for the right to interconnect with or gain unbundled access to the incumbent's network and the right to resell the incumbent's retail services.

2. Whether the Commission reasonably implemented 47 U.S.C. 251(c)(3) by prohibiting an incumbent LEC, when it receives a request from another carrier for access to network elements, from separating previously combined elements over the objection of the requesting carrier.

3. Whether the Commission reasonably interpreted 47 U.S.C. 252(i), which requires an incumbent LEC to "make available any interconnection, service, or network element provided under an agreement * * * to which it is a party to any other requesting telecommunications carrier," to entitle a requesting carrier to select some specific terms of a preexisting agreement without having to accept the entire agreement.

PARTIES TO THE PROCEEDING

The petitioners are the Federal Communications Commission and the United States of America.

The parties to the underlying proceedings are listed in the appendix to the petition for a writ of certiorari in *AT&T Corp. et al.* v. *Iowa Utilities Board et al.*, at 1a-4a, 73a-78a, 92a. See note 1, *infra*.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States and the Federal Communications Commission, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Eighth Circuit in these cases.

OPINIONS BELOW

The principal opinion of the court of appeals in *Iowa Utilities Board* v. *FCC* (Pet. App. 1a-67a)[1] is reported at 120 F.3d 753. The court's order on rehearing (Pet. App.

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in *AT&T Corp. et al.* v. *Iowa Utilities Board et al.*, which seeks review of the same judgments as this petition.

69a-72a) is not yet reported. The opinion of the court of appeals in *People of the State of California* v. *FCC* (Pet. App. 73a-91a) is reported at 124 F.3d 934. The First Report and Order of the Federal Communications Commission (FCC) is reported at 11 FCC Rcd. 15,499, and the Second Report and Order of the FCC is reported at 11 FCC Rcd. 19,392. Copies of both the First and the Second Report and Order have been lodged with this Court in *AT&T Corp. et al.* v. *Iowa Utilities Board et al.* See note 1, *supra*.

JURISDICTION

The judgment of the court of appeals in *Iowa Utilities Board* was entered on July 18, 1997. A subsequent order in that case, granting rehearing in part and denying rehearing in part, was issued on October 14, 1997. The judgment in *People of the State of California* was entered on August 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, appear at Pet. App. 93a-130a.

STATEMENT

In the Telecommunications Act of 1996 (the 1996 Act), Pub. L. No. 104-104, 110 Stat. 56, Congress directed the Federal Communications Commission (FCC) to complete, within six months of the Act's passage, "all actions necessary to establish regulations to implement" the Act's new "interconnection" provision—Section 251—which opens local telephone markets to competition. See 47 U.S.C. 251(d)(1).[2] This case involves challenges to the Commis-

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[2] In referring to the provisions of the 1996 Act, we have cited the 1996 Supplement to the United States Code. Excerpts of the 1996 Act

sion's implementation of that statutory directive. See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15,499 (1996) (First Report and Order) (excerpts printed at Pet. App. 131a-337a); *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 19,392 (1996) (Second Report and Order) (excerpts printed at Pet. App. 338a-353a).

1. Since the breakup of the Bell System in 1984, two sets of carriers have provided most telephone service in the United States: local exchange carriers (LECs), including the Bell Operating Companies and GTE, and long-distance (or "interexchange") carriers, including AT&T, MCI, and others. In virtually all areas, local exchange service is controlled by a single incumbent LEC. That LEC owns almost all of the "loops" (the wires that connect telephones to switches) in its service area, along with the switches themselves and the transport "trunks" that connect the switches.

A long-distance call begins in one local exchange and ends in another. To place such "interexchange" calls, interexchange carriers must rely on the same facilities that LECs use to provide service within local calling areas. Thus, a long-distance call from Washington to Atlanta is transported from the caller's telephone through Bell Atlantic's local network to a point of interconnection with an interexchange carrier (say, MCI); MCI then transports the call along its interexchange network to Atlanta, where BellSouth completes the call through its network to the appropriate destination. In originating or completing an interexchange call, a LEC provides "exchange access" (47 U.S.C. 153(16)) to the interexchange carrier. Interexchange carriers pay LECs billions of dollars each year

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are printed in the appendix to the petition in *AT&T Corp. et al.* v. *Iowa Utilities Board et al.* See note 1, *supra*.

in interstate "access charges." See *Access Charge Reform*, 11 FCC Rcd. 21,354, 21,371 (1996).

2. The 1984 breakup of the Bell System spurred the growth of competition in the long-distance market, and average retail long-distance prices have dropped more than 70% since then. See *AT&T Reclassification*, 11 FCC Rcd. 3271, 3308-3312 (1995). But the incumbent LECs have retained virtually total monopoly control of local telephone markets.

The barriers to entry into those markets are different from, and vastly more formidable than, the barriers to entry into the long-distance market. It has been economically practicable for some long-distance carriers to build their own interexchange infrastructure—*e.g.*, to lay cable or build microwave networks connecting local calling areas to one another—so long as they can rely (albeit at a cost) on the LECs on either end of an interexchange call to route the call through various switches and local loops from the calling party to the call's destination. But to duplicate a LEC's network—to create a new network of switches and a complete new infrastructure of loops connecting every house and business in a calling area to those switches and thus to one another—would be economically impracticable even for the largest prospective competitor, at least with current technology. Moreover, without rights of access to the existing network, a potential competitor could not gradually enter the market through *partial* duplication of local telephone facilities: an upstart carrier would win few customers if its customers could call only one another and not customers on the incumbent LEC's separate (and completed) network.

For many years, telephone regulators assumed "that service could be provided at the lowest cost to the maximum number of consumers through a regulated monopoly network." Pet. App. 131a. Until recently, therefore,

"[s]tate and federal regulators devoted their efforts * * * to regulating the prices and practices of these monopolies and protecting them against competitive entry." *Ibid.* By 1996, however, Congress had concluded that a revolutionary change in regulatory objectives was necessary to serve the public interest. It therefore enacted the Telecommunications Act of 1996 to end the dominance of regulated monopolies in local telephone markets and to open those markets to full competition.

Congress recognized that no prospective entrant could hope to compete with the incumbent LECs in providing consumers with telephone exchange service and exchange access by replicating the existing local network infrastructure. The 1996 Act therefore entitles potential competitors to enter local telephone markets by using the incumbent monopolists' own networks in three distinct but overlapping ways. See 47 U.S.C. 251(c)(2)-(4). *First*, Section 251(c)(2) requires incumbent LECs to "interconnect" their networks with those of other carriers, and to do so at "just, reasonable, and nondiscriminatory" rates and terms. 47 U.S.C. 251(c)(2). *Second*, Section 251(c)(3) gives potential competitors a right to gain "unbundled access" to elements of an incumbent LEC's network: *i.e.*, to lease individual network elements (*e.g.*, local loops, switching capability, etc.) at separate prices, which also must be "just, reasonable, and nondiscriminatory." That provision permits new entrants, some of which may also construct network elements of their own, to lease from incumbents whatever combinations of elements they need to provide exchange access and local exchange service to their customers. *Finally*, Section 251(c)(4) gives potential competitors a right to buy an incumbent LEC's retail services "at wholesale rates" and then to resell them to end users.

A separate provision, 47 U.S.C. 252, sets forth the procedures that individual entrants and incumbent LECs must follow when implementing those core requirements of Section 251. Section 252 provides for a period of negotiation between incumbents and new entrants, followed by expeditious arbitration by state public utility commissions of any unresolved interconnection issues.[3] Section 252(c)(1) requires state arbitrators to conform their disposition of "open issues" in such agreements to federal standards: to "the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251." With particular respect to arbitration of open *rate* issues, Section 252(c)(2) provides that, in addition to the requirements of Section 251, rates for interconnection under Section 251(c)(2) and unbundled elements under Section 251(c)(3) must be "based on * * * cost" and "may include a reasonable profit." 47 U.S.C. 252(d)(1). Section 252 further provides that the "wholesale rates" charged to resellers under Section 251(c)(4) must be based on retail rates, excluding the portion of those rates attributable to "costs that will be avoided." 47 U.S.C. 252(d)(3). All agreements approved or arbitrated by state commissions are subject to review in federal district court —and not in any state court—to determine whether they "meet[] the requirements" of Sections 251 and 252. See 47 U.S.C. 252(e)(4) and (6).

3. Section 251(d)(1) directs the Commission, within six months of the Act's passage, to complete "all actions necessary to establish regulations to implement the requirements" of Section 251. Accordingly, on August 8, 1996—after a massive rulemaking proceeding in which interested parties filed approximately 17,000 pages of comments—the

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[3] Congress directed the FCC to resolve such disputes whenever a state commission opts out of its statutory role. See 47 U.S.C. 252(e)(5).

Commission issued its First Report and Order implementing the local competition provisions of the new Act.

Because existing telephone networks embody significant economies of scale, the Commission sought to ensure that those economies would "be shared in a way that permits the incumbent LECs to maintain operating efficiency to further fair competition, and to enable the entrants to share the economic benefits of that efficiency in the form of cost-based prices." Pet. App. 137a. The Commission recognized, however, that incumbent LECs have little incentive to open their networks to new entrants that seek to compete for the incumbents' customers. *Id.* at 136a-137a, 139a, 167a-168a. The Commission concluded that the disparity in bargaining power between incumbents and new entrants is best addressed by defining the requirements of the new Act in enough detail to advise parties of their minimum rights and obligations, and by establishing a national regulatory baseline to reduce transaction costs. *Id.* at 167a-168a, 171a-173a.

First, the Commission deemed it "critical * * * to establish among the states a common, pro-competition understanding of the pricing standards" for interconnection, unbundled access, and resale. First Report and Order, ¶ 618. The Commission determined that the price for interconnection and access to unbundled network elements should be based on "forward-looking" costs rather than on the "embedded" costs reflected on the ratemaking accounting books. *Id.*, ¶ 620. In brief, the forward-looking cost methodology adopted by the Commission asks what it would cost to construct and operate an efficient telephone network today, and it creates a framework for setting prices for network elements on that basis. See *ibid.*

In implementing the scope of an incumbent LEC's substantive obligation to provide "nondiscriminatory access to network elements," 47 U.S.C. 251(c)(3), the Commission

provided that, "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. 51.315(b) (Rule 315(b)). The Commission also construed the nondiscrimination mandate of Section 251(c) to require incumbent LECs to "permit third parties to obtain access * * * to any individual interconnection, service, or network element arrangement on the same terms and conditions as those contained in any agreement approved under section 252" without having to accept the entire agreement. Pet. App. 263a. The FCC found (*id.* at 261a-264a) that interpretation consistent with, and effectively compelled by, the language of 47 U.S.C. 252(i). The court of appeals referred to the Commission's regulation on that issue as "the pick and choose rule."

In its Second Report and Order, also issued on August 8, 1996, the Commission adopted rules implementing the "dialing parity" requirement of Section 251(b)(3). Pet. App. 338a-353a. Dialing parity permits a new entrant's subscribers to make calls without having to dial an access code of extra digits.

4. Respondents filed petitions for judicial review of the First Report and Order in a number of federal circuits. Those petitions were consolidated and assigned by lottery to the Eighth Circuit. See 28 U.S.C. 2112(a)(3). A challenge to the Commission's dialing parity rules, originally filed in the D.C. Circuit, was subsequently transferred to the Eighth Circuit. On October 15, 1996, the court of appeals granted motions to stay the Commission's pricing and "pick and choose" rules. 109 F.3d 418. Without opinion, this Court denied applications filed by the Commission and several other parties to lift the stay. See 117 S. Ct. 378, 379 (1996) (Thomas, J., in chambers); 117 S. Ct. 429 (1996).

On July 18, 1997, the Eighth Circuit issued its decision on the merits. The court first held that Sections 252(c)(2) and (d) gave state commissions exclusive authority to interpret the pricing terms of Sections 251 and 252 and implicitly divested the Commission of any rulemaking role in that area. Pet. App. 10a-14a; see also *id.* at 27a-30a, 34a-36a (holding that Commission lacks jurisdiction to implement "rural exemptions" issues under 47 U.S.C. 251(f) and "preexisting agreement" requirement of 47 U.S.C. 252(a)(1)). Moreover, the court held (*id.* at 15a), "[a]ny ambiguity" regarding the Commission's jurisdiction over pricing and other issues arising under Section 251 "is resolved by the operation of section 2(b)" of the Communications Act of 1934, which provides that "nothing in this [Act] shall be construed to apply or to give the Commission jurisdiction with respect to * * * intrastate communication service." 47 U.S.C. 152(b); see generally *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355 (1986). The court posited that the matters governed by the interconnection provisions of the Act "are fundamentally intrastate in character" because—even though the local exchange network is indispensable to the origination and completion of any call, whether intrastate or interstate—that "tangential impact on interstate services is not sufficient to overcome the operation of section 2(b)." Pet. App. 22a, 23a.

The court's subsequent decision invalidating the Commission's dialing parity rules (Pet. App. 73a-91a) confirmed the breadth and centrality of its earlier holding that Section 2(b) divests the FCC of jurisdiction to implement provisions of the 1996 Act that do not themselves specifically "mention" (*id.* at 85a) the Commission. The court ruled that the Commission lacks jurisdiction to address issues relating to dialing parity because the particular substantive terms of the dialing parity provi-

sion, 47 U.S.C. 251(b)(3), "make[] no reference whatsoever to the FCC." Pet. App. 85a. In the absence of such a "reference," the court held, the FCC may play no role in implementing the terms of Section 251, despite Congress's plenary grant of rulemaking authority to the Commission to implement the substantive terms of the Communications Act, 47 U.S.C. 201(b), and despite the 1996 Act's highly specific grant of rulemaking authority to "complete all actions necessary to establish regulations to implement the requirements" (47 U.S.C. 251(d)(1)) of Section 251. See Pet. App. 85a; accord *id.* at 12a n.10, 29a n.23, 37a.

Apart from those "jurisdictional" holdings, the court of appeals addressed a variety of other issues and invalidated, on their merits, two central regulations on subjects that it acknowledged the FCC has statutory authority to address. First, the court vacated the "pick and choose rule." It acknowledged that the text of Section 252(i) "could indicate that the FCC's approach was intended by Congress." Pet. App. 25a n.22. Nonetheless, the court concluded that, by allowing entrants to select the favorable terms of a prior agreement "without being bound by the corresponding trade-offs that were made in exchange for the favorable provisions," the Commission's plain-language approach would frustrate a perceived congressional preference for "voluntary" agreements. *Id.* at 25a. Second, although the court had initially left Rule 315(b) intact, it reversed course on rehearing and vacated the rule on the ground that Section 251(c)(3), which requires an incumbent LEC to "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements," entitles a LEC to disconnect previously combined elements even if the requesting

carrier seeks to use them in the same combination. *Id.* at 70a-71a.[4]

REASONS FOR GRANTING THE PETITION

The 1996 Act is "an unusually important legislative enactment" whose "major components * * * were designed to promote competition in the local telephone service market." *Reno* v. *ACLU*, 117 S. Ct. 2329, 2337-2338 (1997). The court of appeals' decisions in this case, however, have greatly encumbered the process of opening that $100 billion market to competition and of ensuring the consumer benefits that the 1996 Act was designed to provide. Because those decisions were incorrect, because they conflict in principle with the decisions of other federal circuits, and because there may never be another opportunity for any court to address the fundamental issues presented here, this Court should grant review.

1. a. Section 251 prescribes a set of new federal standards to govern the development of competitive local telephone markets: standards relating to such critical issues as dialing parity, 47 U.S.C. 251(b)(3), and the prices that incumbent monopolists may charge competitors for interconnection, unbundled access to network elements, and resale, 47 U.S.C. 251(c); see also 47 U.S.C. 251(b)(5) (transport and termination), 251(f) (rural exemptions). The court of appeals held that the Commission lacks statutory authority to implement many of those federal standards because, in the court's view, Congress did not

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[4] In September 1997, several parties filed petitions for a writ of mandamus "to enforce the court's mandate." Those mandamus petitions, upon which the court of appeals has not acted, see Pet. App. 68a, involve issues arising under 47 U.S.C. 271, which governs the terms under which the Bell Operating Companies may enter the interstate long-distance market. Those mandamus petitions do not affect the finality of the decisions under review, nor should they delay this Court's disposition of the pressing issues presented in this petition.

speak with sufficient clarity or specificity in granting it that authority. We disagree.

Congress explicitly directed the Commission, "[w]ithin 6 months after the enactment of [the 1996 Act]," to "complete all actions necessary to *establish regulations to implement* the requirements" of Section 251, including the dialing parity requirement of Section 251(b)(3) and the pricing requirements of Section 251(c). 47 U.S.C. 251(d)(1) (emphasis added). That provision, standing alone, confirms the Commission's authority to set national standards implementing those core federal requirements of Section 251. The court of appeals, however, held that Section 251(d)(1) "operates primarily"—indeed, *only*—"as a time constraint." Pet. App. 12a. That is incorrect. By its unmistakable terms, Section 251(d)(1) is both a six-month deadline and a grant (or confirmation) of regulatory authority to implement the substantive provisions of Section 251.

Even apart from Section 251(d)(1), moreover, Section 201(b) of the Communications Act of 1934, into which the 1996 provisions are incorporated, see § 1(b), 110 Stat. 56, independently authorizes the Commission to "*prescribe such rules and regulations* as may be necessary in the public interest *to carry out the provisions of this [Act].*" 47 U.S.C. 201(b) (emphasis added); see also 47 U.S.C. 154(i), 303(r); see generally *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219 (1943). Although the Eighth Circuit held that the scope of the Commission's authority under Section 201(b) is "expressly limited to interstate or foreign communications services by subsection 201(a)," Pet. App. 12a, that is not the case: nothing in Section 201(a) limits the Commission's authority under the final sentence of Section 201(b) to implement all the substantive terms of the Communications Act. See also 47 U.S.C. 151. To our knowledge, the court of appeals' decision marks the

first time any court has held that, despite Section 201(b), the Commission lacks statutory authority to implement key substantive provisions of federal telecommunications law.

Another provision of the 1996 Act—Section 251(d)(2)—independently confirms the Commission's authority to implement the core terms of Section 251. Section 251(c)(3), the "unbundling" provision, not only imposes general rules about "rates," but also, among other things, directs incumbent LECs to provide access to network elements "on an unbundled basis at any technically feasible point." In turn, Section 251(d)(2) requires the Commission to consider certain proprietary interests "[i]n determining what network elements should be made available." Significantly, however, although Section 251(d)(2) assumes that the Commission has jurisdiction to issue regulations listing the network elements that must be unbundled—a point that the court of appeals acknowledged, see Pet. App. 12a n.10—nothing in Section 251(d)(2) itself serves as an affirmative grant of that jurisdiction to implement Section 251(c)(3). That jurisdiction must therefore derive from independent sources of rulemaking authority: from Section 251(d)(1) and, more generally, from Section 201(b). Those same sources of authority likewise authorize the Commission to issue rules relating to the other provisions of the 1996 Act that require implementation—including, most obviously, the other provisions of Section 251(c)(3) itself.

Section 251(d)(3), also added by the 1996 Act, supports the same conclusion. That provision states that the Commission "shall not preclude the enforcement of any regulation, order, or policy of a State commission" *if* the state rule "is consistent with the requirements of this section" *and* the rule "does not substantially prevent implementation of the requirements of this section and the

purposes of this part." 47 U.S.C. 251(d)(3). By obvious implication, Section 251(d)(3) presupposes that the Commission *does* have authority (under Sections 251(d)(1) and 201(b)) to preempt state laws, even laws not directly inconsistent with the statutory terms, if the Commission determines that such laws undermine the statute's "implementation" and "purposes." The court of appeals sought to avoid that conclusion by holding that Section 251(d)(3) entitles the Commission to invalidate only those state rules that violate "the terms of section 251," Pet. App. 37a-38a, not state rules that violate the Commission's interpretation of those terms. That distinction is without merit. The meaning and "purposes" of Section 251—for example, of the requirement that interconnection rates be "just, reasonable, and nondiscriminatory"—require explication, and it makes little sense to presume that Congress withheld that interpretive role from the agency to which it had given preemptive authority. Cf. *City of New York* v. *FCC*, 486 U.S. 57 (1988). Like Section 251(d)(1) and (2), therefore, Section 251(d)(3) forecloses the court's conclusion that Congress denied the Commission authority to implement the core substantive provisions of Section 251.[5]

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[5] Similarly, the court's conclusion is in severe tension with Section 253(d), which gives the Commission broad authority to preempt or set aside any state action that "*ha[s] the effect* of prohibiting the ability of any entity" to enter local markets. 47 U.S.C. 253(a) and (d) (emphasis added); see also 47 U.S.C. 208 (authorizing Commission to adjudicate complaints concerning actions that "contraven[e]" federal telecommunications law). The court of appeals' narrow construction of the Commission's role under Sections 208, 251(d)(3), and 253 (see Pet. App. 30a-34a, 36a-40a) is largely predicated upon, and should fall with, its erroneous curtailment of the Commission's jurisdiction to implement the substantive terms of Section 251. See also Pet. App. 34a-36a (erroneously holding, for similar reasons, that Commission lacks jurisdiction to implement 47 U.S.C. 252(a)(1)). Finally, the court's holding on the scope of the Commission's jurisdiction is inconsistent with Congress's decision to ensure that the Commission would not exercise its discretionary "forbearance" authority—under which the Commission

As the court of appeals recognized, Sections 252(c)(2) and 252(d) authorize state commissions to "establish * * * rates" when arbitrating specific disputes between incumbent LECs and new entrants. See 47 U.S.C. 252(c)(2); accord 47 U.S.C. 252(d). But from those provisions it does not follow, as the court of appeals believed it must (Pet. App. 13a-14a), that Congress denied the Commission any role in implementing this aspect of federal telecommunications law and gave each of the 50 state commissions *exclusive* jurisdiction to define, at the most basic methodological level, the standards that govern what constitute "just, reasonable, and nondiscriminatory" rates as a matter of *federal law.*

Instead, Congress assigned to the FCC and the state commissions concurrent and complementary pricing roles in fostering competition in local telephone markets. Thus, the Commission must "establish regulations to implement" (47 U.S.C. 251(d)(1)) the rate provisions of Section 251(c) by resolving general methodological issues. Then, in arbitrating specific disputes under Section 252, state commissions may exercise their considerable discretion to establish actual carrier-to-carrier rates in light of carrier- and region-specific variables such as geography, population density, and so forth. Congress did not, however, authorize the state commissions to determine, and inevitably to diverge on, such basic federal issues as

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determines on policy grounds that otherwise required regulation of an area is unnecessary, see 47 U.S.C. 160(a)—to "forbear from applying the requirements of section 251(c) * * * until it determines that those requirements have been fully implemented." 47 U.S.C. 160(d); see Pet. App. 86a (discussing Section 160(d)). If the Commission truly lacked authority to "apply" most of the "requirements" of Section 251(c), as the court of appeals believed, it would have made no sense for Congress to have taken special measures to ensure that the Commission *would in fact* "apply[] the requirements" of that Section until "it determines" that they have been "fully implemented."

whether interconnection and unbundling rates should be based on forward-looking or embedded costs. Instead, it ordered state commissions, when arbitrating "*any* open issues," to adhere to "the requirements of section 251, *including the regulations prescribed by the Commission pursuant to section 251.*" 47 U.S.C. 252(c)(1) (emphasis added); see p. 6, *supra*.[6]

In sum, Congress was quite clear in granting the Commission the authority to implement the core provisions of Section 251, including the dialing parity provision of Section 251(b)(3) and the pricing provisions of Section 251(c). But even if Congress had left some ambiguity on the matter, the Commission's interpretation of its statutory authority to implement those provisions would at least be reasonable and thus entitled to judicial deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984); see also *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 380-381 (1988) (Scalia, J., concurring in the judgment) (noting that *Chevron* deference extends to agency's determination of its own scope of authority).

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[6] Similarly, when issuing implementing regulations under Section 251, the Commission must ensure the substantive consistency of those regulations with the requirements of Section 252(d). Although the court of appeals asserted that Section 252(d) "provides statutory standards" that "negat[e] any need for additional FCC-mandated rate-making standards or guidelines," Pet. App. 14a, that assumption is false: the "standards" at issue require interpretation, and their meaning is the subject of widespread disagreement. For example, Section 252(d)(1) provides that rates for interconnection and unbundled elements shall be "based on * * * cost," a term that has historically assumed many meanings and that has now spawned numerous disputes in state arbitration proceedings on such basic issues as whether an incumbent LEC may recover historic costs or forward-looking costs and, if the latter, which forward-looking pricing methodology is appropriate.

b. Central to the court of appeals' analysis of the Commission's statutory jurisdiction was its interpretation of Section 2(b) of the Communications Act of 1934, which provides that "nothing in this [Act] shall be construed to apply or to give the Commission jurisdiction with respect to * * * charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." 47 U.S.C 152(b); see generally *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355 (1986). That provision, the court declared, "is hog tight, horse high, and bull strong," and bars the Commission from "intruding on the states' intrastate turf." Pet. App. 23a. The court identified, as part of that protected "intrastate turf," the implementation of federal competition standards that *supplant* the traditional role of state commissions in managing and sustaining local exchange monopolies.[7] For two independent reasons, the court's reliance on Section 2(b) is in error.

First, Section 2(b) is a rule of construction and, as such, is inapplicable where Congress "straightforward[ly]" subjects an aspect of intrastate telecommunications to federal regulation. *Louisiana*, 476 U.S. at 377; see also Pet. App. 16a (same); see, *e.g.*, *Illinois Pub. Telecommunications Ass'n* v. *FCC*, 117 F.3d 555, 561-562, clarified on other grounds on reh'g, 123 F.3d 693 (D.C. Cir. 1997). Here, it is undisputed that Congress "straightforwardly" and comprehensively subjected competition in local telephone mar-

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[7] Sections 251 and 252 do not affect the scope of a state commission's traditional authority to regulate the *retail* rates that LECs may charge their customers. Instead, those provisions address a subject that, before 1996, neither the federal government nor most state commissions had ever addressed: the terms under which a new LEC may use an incumbent LEC's network to provide competing local telephone services. That subject has not been a traditional part of state regulation of telephone service, despite the court of appeals' misplaced concern about the "states' intrastate turf."

kets to regulation under federal law. The only question is whether Congress also intended the Commission's regulatory jurisdiction to be coextensive with the substantive scope of the Act's new provisions, just as, under Section 201(b), see pp. 12-13, *supra*, the Commission has always had regulatory jurisdiction coextensive with the substantive scope of the Act's telecommunications provisions.

The answer to that question is yes. As discussed above, even apart from Section 251(d)(1), key provisions of the 1996 Act presuppose the Commission's authority, without themselves serving as a source of that authority, to regulate certain local exchange matters that the Act has made a subject of federal law. See, *e.g.*, 47 U.S.C. 251(d)(2) (assuming that Commission would have authority to define "network elements" for unbundling purposes). Congress saw no need, however, to amend Section 2(b) to confirm that presupposition.[8] More broadly, Congress saw no need to amend Section 2(b) to confirm that, under Sections 201(b) and 251(d)(1), it has squarely authorized the Commission to implement the core federal provisions of Section 251, including the provisions relating to dialing parity and pricing. Compare *Louisiana*, *supra* (holding that Section 2(b) bars the Commission from exercising ancillary jurisdiction over intrastate matters to which the substantive terms of the Act do *not* clearly extend).

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[8] Despite the court of appeals' contrary suggestion (see Pet. App. 18a n.17), the legislative history addressing the relationship between Section 2(b) and the 1996 Act is consistent with, and in fact supports, the Commission's position on the scope of its authority to implement the 1996 Act. Although early versions of the 1996 legislation would have expressly amended Section 2(b) to except Sections 251 and 252 (among other provisions), Congress indicated that the omission of that amendment from the final legislation was a technical, non-substantive change, see S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996), a characterization that belies the court's view that the omission had profound jurisdictional consequences.

Second, even if there were some ambiguity concerning the Commission's authority to implement the core provisions of Section 251, Section 2(b) still would not operate to bar the Commission from exercising that authority, because the regulatory subjects of Sections 251 and 252 are inextricably both interstate and intrastate in character. The court of appeals' contrary holding—that those subjects are "fundamentally intrastate in character" (Pet. App. 22a) and therefore beyond the Commission's jurisdiction—is inconsistent with the decisions of other courts of appeals in analogous cases and rests on a basic misunderstanding of the telecommunications industry and of telecommunications law.

The same facilities that are used to provide local service are also used to provide interexchange access. See pp. 3-4, *supra*. Thus, "[t]he same loop that connects a telephone subscriber to the local exchange necessarily connects that subscriber into the interstate network as well." *National Ass'n of Regulatory Util. Comm'rs* v. *FCC*, 737 F.2d 1095, 1113 (D.C. Cir. 1984) (*NARUC*), cert. denied, 469 U.S. 1227 (1985). For that reason, and consistently with Section 2(b), retail rates designed to cover the cost of the "local" telephone network have long reflected a combination of "intrastate" charges determined by state regulators and "interstate" charges (*e.g.*, "subscriber line" charges) determined by the FCC. See generally *id.* at 1103-1110; see also *Louisiana*, 476 U.S. at 375-376. Likewise, incumbent LECs derive many billions of dollars in annual revenues from long-distance carriers for the provision of interstate exchange access.

Because courts and regulators have always treated the "local" exchange network as both intrastate and interstate in character, cf. Pet. App. 22a, the traditional jurisdictional principles embodied in Section 2(b)—even if Congress had not superseded them in this context—would

confirm the indispensable role of the FCC in implementing the core federal standards of Section 251. As the Commission determined (Pet. App. 194a-195a), it would be neither practicable nor at all consistent with the 1996 Act for the FCC and the state commissions to treat the rates for interconnection and unbundled access like retail rates, such that the ultimate rate a competing carrier must pay an incumbent LEC would reflect a combination of an "intrastate" rate set by a state commission and an "interstate" rate set by the FCC. Indeed, during the Commission's rulemaking proceedings, no party even suggested such a regime. See *id.* at 195a. As this Court has recognized, where it is "not possible to separate the interstate and the intrastate components" of telephone regulation, the Commission may ensure effective regulation of the interstate component, despite Section 2(b), by preempting inconsistent state regulation of the matter in issue. *Louisiana*, 476 U.S. at 375 n.4 (emphasis omitted); accord *Public Serv. Comm'n of Maryland* v. *FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990); *Illinois Bell Tel. Co.* v. *FCC*, 883 F.2d 104, 114-116 (D.C. Cir. 1989); *Public Util. Comm'n of Texas* v. *FCC*, 886 F.2d 1325, 1331 (D.C. Cir. 1989); *North Carolina Utils. Comm'n* v. *FCC*, 552 F.2d 1036, 1045-1046 (4th Cir.) (*NCUC II*), cert. denied, 434 U.S. 874 (1977); see also 47 U.S.C. 251(d)(3), 253(d).

In deeming the local telephone network "fundamentally intrastate in character," however, and in holding that Section 2(b) divests the Commission of *all* jurisdiction to regulate aspects of that network that cannot be separated for relevant purposes into "interstate" and "intrastate" components, the decision below conflicts in principle not only with *Louisiana*, but also with decisions of other courts of appeals, particularly the Fourth and D.C. Circuits, which have recognized the Commission's authority to regulate aspects of the local telephone network in analogous cir-

cumstances. Those courts have held that the Commission has exclusive authority, consistent with Section 2(b), to facilitate competition by deregulating or detariffing terminal equipment that customers plug into the local telephone network, whether or not a given customer uses that equipment to make interstate calls. See *Computer & Communications Indus. Ass'n* v. *FCC*, 693 F.2d 198, 214-216 (D.C. Cir. 1982) (*Computer II*), cert. denied, 461 U.S. 938 (1983); *NCUC II*, 552 F.2d at 1045-1046 (cited approvingly in *Louisiana*, 476 U.S. at 375 n.4); *North Carolina Utils. Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.) (same), cert. denied, 429 U.S. 1027 (1976); see also *California* v. *FCC*, 39 F.3d 919, 932-933 (9th Cir. 1994), cert. denied, 514 U.S. 1050 (1995). Similarly, the D.C. Circuit has recognized the Commission's authority to impose a flat subscriber line charge on all end users of the local network to recover the interstate component of the costs of that network, "although the plant in question is necessary to make local calls, and although some subscriber[s] might use it *only to make local calls*." *NARUC*, 737 F.2d at 1114-1115 (emphasis added).

The Fourth and D.C. Circuits have upheld the Commission's authority over those aspects of the "local" telephone network because, unlike the Eighth Circuit, they recognize that that network is inherently both intrastate *and* interstate in character. See also *Public Serv. Comm'n of Maryland*, 909 F.2d at 1515 ("we have frequently held that services provided locally by the LECs which support access to the interstate communications network have interstate as well as intrastate aspects"); *Public Util. Comm'n of Texas*, 886 F.2d at 1331 (lines interconnecting private microwave network to local exchange are not exclusively "intrastate"); *Illinois Bell*, 883 F.2d at 110 n.4, 113-116 ("Centrex" service is not exclusively "intrastate"). And, unlike the Eighth Circuit,

those courts further recognize that if Section 2(b) were construed "to give the states primary authority" over facilities "used interchangeably for interstate and intrastate service," the Commission "would necessarily be prevented from discharging its statutory duty * * * to regulate interstate communication," a result that Congress never intended. *NCUC II*, 552 F.2d at 1045; accord *Illinois Bell*, 883 F.2d at 116; *Computer II*, 693 F.2d at 215-216; *NARUC*, 737 F.2d at 1114-1115. This Court should not allow the outcome of this case, with its enormous nationwide implications, to depend on which circuit happened to be selected in a jurisdictional lottery. See p. 8, *supra*.

c. On a practical level, the court of appeals' concern about federal "intru[sion] on the states' intrastate turf" (Pet. App. 23a) serves not to protect that "turf" from the application of federal standards, but only to impede the competition that Congress sought to bring to local telephone markets throughout the United States. The 1996 Act does not leave local competition matters to the States to govern as a matter of state law; instead, it subjects those matters to comprehensive regulation under federal law and gives the States a role in implementing that federal law. Moreover, the federal standards of the 1996 Act require national application. Although Congress assigned the States the important task of tailoring those standards to accommodate region- or carrier-specific variables, it did not leave room for 50 state commissions to disagree about the basic legal issues that inevitably arise under the Act, such as what dialing parity is and whether interconnection rates should be based on forward-looking economic costs or on an incumbent carrier's embedded costs.

Sooner or later, the federal courts will have to decide those issues. Congress provided two methods of federal-

court review of issues arising under Sections 251 and 252: comprehensive court of appeals review of all FCC regulations under the Administrative Procedure Act, and federal district court review of individual state arbitration decisions under Section 252(e)(6) to determine whether those decisions comply with the Act and the Commission's implementing regulations. In holding that the Commission lacks jurisdiction to adopt regulations addressing the core local competition provisions of the 1996 Act, however, the court of appeals has deprived the district courts of a national regulatory framework within which to review state arbitration decisions and has relegated many of the fundamental disputes under the 1996 Act to piecemeal litigation in disparate proceedings throughout the United States.

The principal question here is therefore not whether the federal judiciary will supply nationally uniform interpretations of the key provisions of the 1996 Act, but when it will do so and in what type of proceeding. We believe that Congress directed the Commission to address the most fundamental issues arising under the Act by August 1996 so that a single court of appeals could resolve those issues on the merits (subject to review by this Court) within a year or two of the Act's enactment.[9] By contrast, under the approach favored by the court of appeals and the incumbent monopolists, full resolution of those issues would not come until years or decades later, after the

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[9] Under 28 U.S.C. 2342(1), known as the Hobbs Act, "exclusive jurisdiction * * * to determine the validity" of the Commission's orders lies with the federal courts of appeals on direct review. If the Eighth Circuit had upheld the Commission's pricing rules on the merits, then, in the absence of additional review by this Court, those rules would not be subject to further challenge in the district court proceedings under Section 252(e)(6). See generally *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984); *Wilson* v. *A.H. Belo Corp.*, 87 F.3d 393, 400 (9th Cir. 1996).

various pricing and other issues have wound their way through 50 state commissions, numerous federal district courts, 12 courts of appeals, and ultimately this Court, all without comprehensive regulatory direction from the federal agency with the expertise to interpret federal telecommunications law.

Thus, to the detriment of consumers, the court of appeals' interpretation of the 1996 Act will subject aspiring new entrants to delay, uncertainty, and burdensome litigation on the basic methodological issues that the Commission sought to address well over a year ago. The federal district courts have already received more than 100 challenges under Section 252(e)(6) to the arbitration decisions of various state commissions; to date, only one of those challenges has been adjudicated on the merits. Because the Eighth Circuit has stayed and vacated the Commission's rules interpreting the Act's core substantive provisions, would-be competitors remain uncertain about the scope of their basic rights under the statute. That pervasive uncertainty is a principal reason why local exchange monopolists still receive approximately 98% of the $100 billion in annual revenues generated by the provision of exchange access and local exchange services. See FCC, *Telecommunications Industry Revenue*, Table 2 (Common Carrier Bureau Nov. 1997).

d. Finally, this Court should grant certiorari in this case because it will likely have no future opportunity to address the scope of the Commission's statutory authority to promulgate rules implementing the pricing, dialing parity, and other local competition provisions of Sections 251 and 252. Because no court may revisit the Eighth Circuit's disposition of those jurisdictional issues, see note 9, *supra*, and because the Commission has no plans to issue new rules on subjects that the Eighth Circuit has deemed beyond its jurisdiction, there is little possibility

that the core issues presented in this petition will arise in some future case.

2. Apart from its jurisdictional holdings, the court of appeals addressed the substantive validity of the FCC's implementation of several provisions of the 1996 Act that the court recognized as within the scope of the Commission's regulatory jurisdiction. Among those FCC rules were the Commission's regulations giving effect to the non-pricing requirements of Section 251(c)(3), which compels incumbent LECs to provide "nondiscriminatory access to network elements on an unbundled basis" and to "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide * * * telecommunications service." 47 U.S.C. 251(c)(3).

In Rule 315(b), the Commission implemented Section 251(c)(3) by providing that, "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. 51.315(b); see Pet. App. 230a-234a. That rule permits a residential customer to switch local exchange carriers without risk that the incumbent LEC will physically disconnect the component pieces of the network serving that customer, force the competing LEC to reassemble those pieces at a substantial cost, and interrupt telephone service in the interim. In its order on rehearing, the court of appeals invalidated Rule 315(b) on the ground that the language of Section 251(c)(3) "requires an incumbent LEC to provide access to the elements of its network *only on an unbundled (as opposed to a combined) basis*." *Id.* at 71a (emphasis added). Central to that holding is the premise that elements are "unbundled" for purposes of Section 251(c)(3) only if they are *physically* separated, a proposition that the incumbent LECs had urged the court to adopt. That construction of "unbun-

dled," however, conflicts with past regulatory usage, contradicts the plain meaning of the term, and converts one of the 1996 Act's most important pro-competitive tools into a statutory authorization of anti-competitive conduct.

Section 251(c)(3) gives a new entrant the option to select from an incumbent's network only those elements that it needs—even if they constitute less than a preexisting package of elements—and to pay only for those elements. In promulgating Rule 315(b), the Commission reasonably determined that the statutory "*duty* to provide * * * nondiscriminatory access to network elements on an unbundled basis * * * in a manner that *allows* requesting carriers to combine such elements" (47 U.S.C. 251(c)(3) (emphasis added)) does not give incumbent LECs a unilateral *right* to pull apart already-combined network elements simply to force the new entrant to incur the expense of recombining them. See Pet. App. 230a-234a.[10] That is because the duty to "unbundle" network elements is an obligation to offer those elements for individual leasing at individual prices, not an obligation (much less an entitlement) to pull them apart over the objection of the requesting carrier.

That use of the term "unbundle"—to denote separate pricing of elements rather than physical separation of elements—is the same use that the Commission and other regulatory agencies have consistently employed when, over the course of the past 15 years, they have adopted "unbundling" policies designed to promote competition. See, *e.g.*, *Bell Atlantic Tel. Cos.* v. *FCC*, 24 F.3d 1441, 1443, 1444 (D.C. Cir. 1994); *California* v. *FCC*, 4 F.3d 1505, 1509

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[10] See also *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98), Third Order on Reconsideration, FCC 97-295, ¶ 44 (Aug. 18, 1997), petitions for review pending, *Southwestern Bell Tel. Co.* v. *FCC*, Nos. 97-3389 et al. (8th Cir. filed Sept. 5, 1997).

(9th Cir. 1993); *Second Computer Inquiry*, 77 F.C.C.2d 384, 443 (1980), aff'd, *Computer II*, *supra*; see also *Northern Natural Gas Co.* v. *FERC*, 929 F.2d 1261, 1263 (8th Cir.), cert. denied, 502 U.S. 856 (1991). Moreover, that usage, and not the court of appeals' alternative interpretation, represents the consistent dictionary definition of "unbundle." See, *e.g.*, *The Random House Dictionary of the English Language* 2055 (2d ed. 1987) ("to separate the charges for (related products or services usually offered as a package)"); *Webster's Ninth New Collegiate Dictionary* 1283 (1986) ("to give separate prices for equipment and supporting services").

In promulgating Rule 315(b), the Commission reasonably assumed that Congress intended to incorporate the established meaning of "unbundled" when it included that industry term in the text of Section 251(c)(3). See *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991). Similarly, the Commission acted reasonably in implementing Section 251(c)(3)'s "unbundling" requirement by determining that LECs have a duty to price elements individually but not a unilateral right to disconnect them if they have been previously joined.

The court of appeals' contrary view not only disregards the plain language of Section 251(c)(3) and the deference to which the Commission's rule is due, see generally *Chevron*, 467 U.S. at 843, but also imperils the competition that Congress sought to bring to local telephone markets by granting new entrants rights of unbundled access to existing networks. Incumbent LECs have unambiguously declared that, under the court of appeals' decision, they will physically disconnect combinations of elements (such as loops and switches), evidently to subject new entrants to the expense of reassembling them. See Opp'n of Intervenors in Supp. of FCC to Pets. for Reh'g, Apps. A-D (filed Oct. 1, 1997) (quoting statements by representatives of

BellSouth, Southwestern Bell, GTE, and US WEST). As the Commission has determined, such wasteful destruction of incumbent networks would serve no obvious purpose beyond imposing additional (and discriminatory) costs on new entrants and forestalling competition in local telephone markets. See Third Order on Reconsideration, ¶ 44.

In sum, the practical consequences of the Eighth Circuit's invalidation of Rule 315(b) are likely to be at least as significant, and at least as inimical to the competition that Congress sought to create, as the court's erroneous limitation of the Commission's regulatory jurisdiction under the 1996 Act. Moreover, as a substantive interpretation of the Act, the court's disposition of Rule 315(b) not only binds the FCC, but may be given conclusive effect in state arbitration proceedings under Section 252. This case may therefore present the final opportunity for this Court to address that issue, which lies at the heart of the 1996 Act and whose resolution will significantly affect the future of competition in telecommunications markets throughout the United States.

3. Finally, this Court should review the court of appeals' invalidation of what it called the Commission's "pick and choose rule." Section 252(i) requires each LEC to "make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. 252(i). The Commission interpreted that language to mean exactly what it says: that a new entrant is entitled, on the same terms and conditions as any other new entrant, to "*any* interconnection, service, *or* network element provided under an [existing] agreement" without also having

to accept *all other* terms of that agreement. Pet. App. 261a-268a.[11]

The court of appeals "acknowledge[d] that the words [of the statute] could indicate that the FCC's approach was intended by Congress." Pet. App. 25a n.22. It nonetheless invalidated the Commission's interpretation and instead construed Section 252(i) to force potential entrants to accept an existing agreement on an all-or-nothing basis, because it feared that a literal approach would "discourage the give-and-take process that is essential to successful negotiations." *Id.* at 26a.

The court of appeals had no valid basis for substituting its own policy concern for the will of Congress. As the legislative history of Section 252(i) suggests,[12] and as the provision's plain language confirms, Congress believed that giving requesting carriers a right to select some but not all of the terms of a preexisting agreement is a necessary means of ensuring full and nondiscriminatory competition in local telephone markets. Moreover, even if Congress had left some ambiguity on that point, the Commission's interpretation was at least reasonable, and the court of appeals had no basis for supplanting that interpretation with its own policy speculation. Indeed, the court's approach threatens to undermine any role for Section 252(i) in many negotiations, because it creates an obvious incentive for incumbent LECs to include extraneous terms in their contracts to ensure that any given

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[11] As a protection for incumbent LECs, the Commission provided that a requesting carrier may invoke that right only if it (1) agrees to the provisions of the existing agreement relating to the particular service or element it wishes to purchase, and (2) imposes on an incumbent LEC costs no greater than those it incurred under the existing agreement. Pet. App. 264a, 265a.

[12] See S. Rep. No. 23, 104th Cong., 1st Sess. 21-22 (1995) (Congress intended earlier version of Section 252(i) to "prevent discrimination among carriers and to make interconnection more efficient by making available to other carriers the individual elements of agreements that have been previously negotiated").

agreement, taken as a whole, will be unpalatable to future would-be competitors.

The court dismissed that concern on the theory that "incumbent LECs have as much interest in avoiding the costs of prolonged negotiations or arbitrations as do the requesting carriers, which gives the incumbent LECs an incentive to negotiate initial agreements that would be acceptable to a wide range of later requesting carriers." Pet. App. 27a. That reasoning is invalid on its face. Incumbent monopolists benefit enormously from any delay in opening their markets to competition, and they will of course prefer "the costs of prolonged negotiations" to the rapid erosion of their monopoly market shares. Contrary to the court of appeals' holding, both Congress and the Commission were entitled to act on that economic premise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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